Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

BARRY L. SMITH, Administrator of the Estate of Glen C. Smith, Deceased, BARRY SMITH, LISA SMITH and BRIAN SMITH, Heirs-at-Law of GLEN C. SMITH, Deceased,

Petitioners,

v.

THE HARTFORD ACCIDENT AND INDEMNITY CO., AMERICAN RED BALL TRANSIT COMPANY, INC., ALBERT PRINTUP,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a case involving the application of the federal Motor Carrier Act with respect to coverage under a federal motor carrier case for punitive damages. The Supreme Court of Kansas does not like punitive damages, nor insurance coverage for such damages. In this case, it ignored federal law and, instead, decided the question based on Kansas law and Kansas public policy. Therefore, in this case, the question presented here is:

> May a state nullify the clear Congressional policy set forth in the federal Motor Carrier Act regarding the absolute liability for an insurance carrier issuing a federally-mandated liability policy which requires it to pay "any final judgment" and, instead impose its own state-created policy to deny coverage for a judgment for punitive damages in an interstate trucking case?

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PETITION FOR WRIT OF CERTIORARI

Barry L. Smith, Administrator of the Estate of Glen C. Smith, ("Smith") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Kansas entered in this proceeding on June 6, 1997, in order to resolve the conflict between Kansas state law and federal law with respect to the interpretation of the federal Motor Carrier Safety Act and its application to a federally-mandated interstate trucking insurance policy issued pursuant to 49 C.F.R. § 1043.1.

OPINION BELOW

The opinion of the Kansas Supreme Court that gives rise to this petition is entitled *Hartford Accident & Indem. Co. v. American Red Ball Transit Co., Inc.*, 262 Kan. 570, 938 P.2d 1281 (1997). It is reprinted in Appendix A hereto ("App. A") at page A-1.

JURISDICTION

On February 8, 1995, the District Court of Sedgwick County, Kansas, issued a memorandum opinion finding that the motor carrier liability insurance policy issued by Hartford Accident and Indemnity Company ("Hartford") to American Red Ball Transit Company ("Red Ball") would cover any punitive damage award entered against it. In a supplemental memorandum opinion issued on May 10, 1995, the court also found that the same policy did not cover a $20,800.00 punitive damage award previously entered against Red Ball's driver, Albert Printup.

The decision of the District Court of Sedgwick County, Kansas, finding that Hartford was liable for payment of Red Ball's punitive damage award was appealed to the Supreme Court of Kansas by Hartford on July 10, 1995. Thereafter, Smith filed a cross-appeal on the decision of the district court refusing to find that the punitive

damage award entered against Printup was not covered by the insurance policy.

The Kansas Supreme Court issued its opinion on June 6, 1997. It reversed the decision of the district court and found that there was no coverage under the motor carrier liability policy for any punitive damage award entered against Red Ball. It affirmed the decision of the district court and found that there was no coverage under the same policy for the punitive damage award entered against Printup.

Red Ball later paid a punitive damage judgment entered against it in the amount of $100,000.00; however, a $20,800.00 punitive damage judgment entered against Printup remains unpaid and uncollectible.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 on the basis that the decision of the Supreme Court of Kansas is in violation of federal laws, statutes and regulations and raises a federal question on the interpretation and application of those laws. This Court has the power over state judgments "to correct them to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945).

STATUTES INVOLVED IN THIS CASE

49 U.S.C. § 10927(a)(1) states, in part:

> The Commission may issue a certificate under section 10922 or 10530 or a permit under section 10923 only if the carrier . . . applying for such certificate files with the Commission a bond, insurance policy, or other type of security approved by the Commission, in an amount not less than such amount as the Secretary of Transportation prescribes. . . . The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the carrier for bodily injury to, or death of an individual resulting from the negligent operation,

maintenance, or use of motor vehicles under the certificate or permit, or for loss or damage to property . . . or both.

49 C.F.R. § 1043.1 states, in part:

No common or contract carrier subject to [these regulations] . . . shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the Commission surety bonds, certificates of insurance, proof of qualifications as self-insurer, or other securities or agreements, in the amounts prescribed in § 1043.2, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation subject to subchapter II, chapter 105, subtitle IV of title 49 of the U.S. Code, or for loss of or damage to property of others. . . .

49 C.F.R. § 1057.12 states:

(d) Exclusive possession and responsibilities – (1) The lease shall provide that the authorized carrier shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

STATEMENT OF THE CASE

This is a declaratory judgment action involving a trucking liability insurance policy insuring an interstate trucking company, Red Ball. The policy contains the federally-mandated ICC Form 90 which requires Hartford to pay "any final judgment" entered against its insureds, Red Ball and Printup. The truck in question was owned

by Southwest Movers ("Southwest") but had been leased to Red Ball for several years so Red Ball could transport household goods in interstate commerce. Southwest also provided a driver, Printup, under the terms of the lease agreement.

The facts of the case, relevant to this appeal, were set out by the Kansas Supreme Court in its opinion:

> The underlying facts of the present case are set forth in *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993) *(Smith v. Printup I)*. That same case was also the subject of a second appeal, *Smith v. Printup*, No. 76,025, this day decided *(Smith v. Printup II)*. Highly summarized, Albert Printup jackknifed his moving van and collided with a pickup truck, killing both occupants of the truck. Carolyn S. Elliott died immediately while Glen C. Smith survived for some minutes before dying at the scene.
>
> Printup was employed by Southwest Movers, Inc., (Southwest) but had been "leased out" to Red Ball for 4 to 5 years preceding the accident. The relatives of Elliott and Smith sued Printup, Southwest, and Red Ball for wrongful death, and the administrator of the Smith estate sued the same defendants for Smith's pain and suffering. The trial court allowed the Smith plaintiffs (Smith) to amend their complaint to seek punitive damages in accordance with K.S.A. 60-3701 against Southwest, Printup, and Red Ball in conjunction with the survivor action.
>
> In addition to awarding compensatory damages in both wrongful deaths, the jury determined that Smith was entitled to punitive damages from Red Ball and Printup but not from Southwest in Smith's survival action. The focus of *Smith v. Printup I* related to punitive damages. We set aside the amount of punitive damages awarded against Red Ball and Printup, reversed the jury determination that Smith

should not be awarded punitive damages against Southwest, and remanded with specific instructions. 254 Kan. at 359-60. Upon completion of the remand proceedings, the trial court set the punitive damage award against Red Ball at $100,000 and against Printup at $20,800. A jury again determined that Southwest was not liable for any punitive damages. In *Smith v. Printup II*, we affirmed both the trial court's and the jury's determinations. Southwest is not a party to this appeal. While Printup does not respond to this appeal, the coverage issues concerning punitive damages against Red Ball and Printup remain.

The policy issued by Hartford was in effect at the time of the accident and contained the necessary Interstate Commerce Commission (ICC) form BMC 90 endorsements. Both Red Ball and Printup were "insureds" under the terms of the policy. Based upon undisputed facts, the trial court determined that Hartford's policy covered the punitive damage award against Red Ball but not the punitive damage award against Printup. While the court decided other matters, the appeals in this case involve only the question of insurance coverage for punitive damage awards against Red Ball and Printup. Additional facts necessary to resolve insurance coverage of punitive damages are set forth in the opinion."

App. A, A4-A5.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Supreme Court Of Kansas Is In Direct Conflict With, And Nullifies, Important Provisions Of The Federal Motor Carrier Safety Act.

This petition is filed because the Supreme Court of the State of Kansas refused to follow the mandates of the federal Motor Carrier Safety Act in an interstate trucking case. Specifically, the court refused to find the federal law

applied (and instead applied Kansas law), it refused to find the trucking company (Red Ball) vicariously liable for the punitive damage award entered against its driver, it refused to find that the insurance policy issued under federal law covered the punitive damage portion of the judgment and it refused to find that the insurance carrier was required to pay the judgment in its capacity as a surety for the trucking company.

Red Ball is an interstate moving company subject to the federal law. Federal law requires all interstate trucking companies to file evidence that they are financially solvent and will pay **"any final judgment"** which might be entered against them if they cause an accident and injure a member of the public. 49 C.F.R. § 1043.1. The law permits them to do this in a variety of ways. One way is for a trucking company to file proof of insurance showing it has a liability insurance policy with language that the insurance carrier will unconditionally pay "any final judgment" entered against its insured. This policy then acts as both a surety bond and an insurance policy.

This federally-mandated insurance policy is different than an ordinary liability policy. Federal law requires such a policy to contain a "BMC Form-90" or "MCS Form-90" endorsement. This form requires the insurance company insuring the motor carrier to pay "any final judgment" entered against the motor carrier as a result of negligence which causes injury to a member of the public. The insurer is not permitted to raise any noncoverage or similar defenses against a member of the public because it acts as the trucking company's surety. If it does pay a judgment for which there is not coverage, the insurance carrier may then seek recovery from the motor carrier for the payment it otherwise would not have been required to pay under normal policy language.

In this case, Red Ball and Printup have been found liable for punitive damages to Smith. They are insureds under an insurance policy issued by Hartford to Red Ball. That policy has the Form 90 endorsement in two places. The insurance policy says Hartford will pay "any final

judgement" entered against its insureds – Red Ball and Printup. The federal law mandating this language is supreme and controls; however, the Supreme Court of Kansas refused to apply federal law as mandated by the Federal Motor Carrier Act. Instead, it applied Kansas law and held that it was against the public policy of Kansas to insure punitive damages; therefore, Hartford does not have to pay the punitive damage awards.

The coverage issue in this case arises because of an accident which occurred in interstate trucking; therefore, federal law controls. Interstate trucking is heavily regulated by the Interstate Commerce Act. 49 U.S.C. § 301 *et seq.* The Act is complemented by regulations known as the federal Motor Carrier Safety Act. 49 C.F.R. § 383 *et seq.* Those regulations, and the statutes which authorize them, are valid. *American Trucking Associations v. United States*, 344 U.S. 298, 73 S. Ct. 307 (1953). *See also Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 96 S. Ct. 229 (1975).

The 1953 amendments to the Interstate Commerce Act, and the authority granted therein to the Interstate Commerce Commission to promulgate regulations, were intended to curb a host of problems and abuses which existed in the interstate trucking industry. *Transport Indemnity Co. v. Carolina Casualty Insurance Co.*, 133 Ariz. 395, 397, 652 P.2d 134, 136 (1982). A synopsis of those problems was set forth in *Alford v. Major*, 470 F.2d 132, 134 (7th Cir. 1972):

> For some time prior to 1953, the effective date of these regulations, the ICC's regulatory system was of a limited nature and as a result a practice whereby authorized carriers used non-owned equipment developed and became widespread. The practice took one of two forms, the interchange or the trip lease. Through the device of interchange two or more certified carriers would provide for through travel of a load in order to merge the advantages of certification to serve different areas. Trip leasing involved the use of

> exempted equipment in authorized carrier operations.
>
> During the Commission hearings on these practices, which first commenced in 1948, it became apparent that these practices had a substantial impact on the regulatory scheme of the Interstate Commerce Act, the public interest in necessary and safe service as well as the economic stability of the industry. Truck leasing, either in the form of an interchange or a trip lease, raised numerous problems. Oral leases were commonly used, for example, thus creating a difficulty in fixing the lessee's responsibility for accidents. Sanctions for the violation of geographical restrictions were difficult to impose since the driver of exempted equipment was not an employee of the authorized carrier. Commission safety requirements were commonly overlooked. Since most of these leases extended for the period of one trip only, the leasing carriers often failed to inspect the equipment used or to extend the supervision of rest periods, doctor's certificates, brakes, lights, tires, steering equipment and loading, normally accorded its own drivers and equipment. The purpose of the regulations thus was "to protect the industry from practices detrimental to the maintenance of sound transportation services . . . " and to assure safety of operation for vehicles and drivers. (Citation omitted.)

See also, Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., supra, 423 U.S. at 38-39; *American Trucking Associations v. United States, supra,* 344 U.S. at 303-07. The act was also intended to eliminate public confusion as to who was responsible for accidents caused by nonowned vehicles. *Empire Fire & Marine Insurance Co. v. Guaranty National Insurance Co.,* 868 F.2d 357, 362 (10th Cir. 1989).

The Interstate Commerce Act and the federal Motor Carrier Safety Act apply to all motor carriers who hold

themselves out to the general public as being involved in interstate trucking operations, including Red Ball. *Starrett v. Bruce*, 391 F.2d 320, 323-324 (10th Cir. 1968); *Interstate Commerce Commission v. AAA Con Drivers Exchange*, 340 F.2d 820, 825 (2nd Cir. 1965).

With this history in mind, courts are required to construe the act and the regulations "most liberally in the interest of members of the public using the highways." *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579, 588 (1969). The Kansas Supreme Court refused to follow and apply that rule. Instead, it held Kansas state law supreme.

A. Federal Motor Carrier Law Preempts State Law If There Is A Conflict Between Them In Areas Intended To Protect The Public From The Consequences Of Motor Carriers Who Are Irresponsible Or Financially Insolvent.

The Supreme Court of Kansas ignored federal law by declaring that federal law did not preempt Kansas law and, instead, applied Kansas law. The Supreme Court of Kansas erred in holding that federal law did not preempt state law on the insurance coverage issue present in this case. That decision has the effect of nullifying federal motor carrier law and making it subservient to Kansas state law and public policy as articulated by the Kansas Supreme Court. This is a clear violation of the Supremacy Clause of the United States Constitution.

The doctrine of federal preemption is founded on the Supremacy Clause of the United States Constitution, which states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., article VI, cl. 2. Thus, any state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112

S.Ct. 2608, 120 L.Ed.2d 407 (1992). *See also, Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1986); *Pacific Gas & Elec. v. State Energy Resources Conservation & Development Com'n*, 461 U.S. 190, 204-05, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983).

There are two primary preemption doctrines – field preemption and conflict preemption. Field preemption applies when Congress intends to occupy a field by explicitly stating such in the federal statute's language or because it is impliedly contained in its structure or purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146 (1947). Conflict preemption arises when Congress has enacted legislation which has not totally displaced state law; however, it sets standards or requirements on specific subjects. State law on the subject is nullified if it either conflicts with the federal law or is an obstacle to accomplishing and executing the goals of the federal law. *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022 (1982); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S. Ct. 988, 994 (1978); *Free v. Bland*, 369 U.S. 663, 82 S. Ct. 1089 (1962). Conflict preemption applies in this case.

The mistake made by the Supreme Court of Kansas is that it refused to apply the rules of conflict preemption, which control in a federal Motor Carrier Safety Act case. *Carolina Freight Carriers v. Com.*, 513 A.2d 579, 583 (Pa Comwlth. 1986). Regulations set forth in the Act establish minimum standards and requirements and require "national uniformity in the regulation of interstate travel." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527, 79 S. Ct. 962, 966 (1959). Preemption also occurs because of congressionally delegated action by the I.C.C. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S. Ct. 2694 (1984); *Watson v. Cleveland Chair Co.*, 789 S.W.2d 538, 542 (Tenn. 1989).

The need for uniformity in interstate trucking regulations has prompted courts to apply the doctrine of conflict preemption on many occasions. Federal law preempts state laws inconsistent with sections of the federal Hazardous Materials Act. *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270, 275 (2nd Cir. 1982); *National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509, 514-515, 519 (D. R.I. 1982) (written notice of accident, curfew and permit and application requirements of a state must match federal law). In *Shirella v. City of Detroit*, 208 Mich. App. 434, 528 N.W.2d 763 (1995), the court held that state law cannot reduce the minimum driver qualifications set forth in the federal Motor Carrier Safety Act because federal law has preempted state law. *See also, Carolina Freight Carriers v. Com.*, 513 A.2d at 583.

Federal law also preempts state insurance coverage requirements that apply to interstate trucking. In *Colorado Public Utilities Com'n v. Harmon*, 951 F.2d 1571, 1581 (10th Cir. 1991), the Tenth Circuit held that the federal Motor Carrier Safety Act preempted Colorado's inconsistent proof of insurance requirements. Federal law preempts state law and makes Form BMC-90 a supplemental insurance agreement as a matter of law. *Command Transp. v. B.J.'s Wholesale Club, Inc.*, 864 F. Supp. 226, 229 (D. Mass. 1994); *Canal Insurance Co. v. First General Insurance Co.*, 889 F.2d 604, 610 (5th Cir. 1989). Federal law controls the insurance contract in this case.

In this case, the Supreme Court of Kansas refused to recognize that federal law preempted the applicable law related to the coverage question and, instead, applied Kansas law to the coverage issues. App. A-19. This was a grievous error as it makes compliance with the intent of controlling federal law impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

B. Interstate Trucking Companies Are Deemed To Be In Full Direction And Control Of Its Leased Vehicles, Which Makes Them Completely Responsible For All Injuries To The Public, Including Judgments For Punitive Damages.

The Kansas Supreme Court made a second error when it held that Red Ball was not vicariously liable for the punitive damage award entered against Printup. App. A-25. When the Interstate Commerce Act was amended, the new provisions required a motor carrier to assume full direction and control of all leased vehicles. 49 U.S.C. §§ 10927(a)(2) and 11107(a)(4), formerly 49 U.S.C. §§ 315 and 304(e)(2), respectively. 49 C.F.R. § 1057.12(d)(1) states that lease agreements must provide that the lessee motor carrier has "exclusive possession, control, and use of the equipment for the duration of the lease." The regulation also requires motor carriers to have written leases which obligate the lessee motor carrier to "assume complete responsibility for the operation of the equipment for the duration of the lease." 49 C.F.R. § 1057.12(d)(1).

The Interstate Commerce Act and the federal Motor Carrier Safety Act have altered and preempted state law with respect to the doctrine of vicarious liability. *Price v. Westmoreland*, 727 F.2d 494, 496 (5th Cir. 1984); *Simmons v. King*, 478 F.2d 857, 860, 866 (5th Cir. 1973). A motor carrier's liability for equipment and drivers covered by leasing arrangements is not governed by traditional common law doctrine of master-servant relationships and *respondeat superior*. *Simmons v. King*, 478 F.2d at 867; *Transport Indemnity Co. v. Carolina Casualty Insurance Co.*, 133 Ariz. at 397, 652 P.2d at 136. *See also Price v. Westmoreland*, 727 F.2d at 496; *Alford v. Major*, 470 F.2d at 134; *Cosmopolitan Mutual Insurance Co. v. White*, 336 F. Supp. 92, 99 (D. Del. 1972); *Ohio Casualty Insurance Co. v. United Southern Assurance Co.*, 85 Ohio St. App. 3d 529, 532, 620 N.E.2d 163, 165 (1993). In fact, a state cannot enact a statute which abolishes the vicarious liability of an interstate motor carrier for its driver. *Smith v. Johnson*, 862 F.Supp.

1287 (M.D. Pa. 1994). Thus, the decision of the Kansas Supreme Court is invalid because it conflicts with, and nullifies, specific federal motor carrier law contrary to the holding of the Kansas Supreme Court.

The motor carrier, by statutorily mandated terms, has "assumed exclusive possession, control, and use of the vehicle and responsibility to the public." The driver becomes the motor carrier's statutory employee and, as such, the motor carrier is "vicariously liable as a matter of law for the negligence of the driver." *Simmons v. King*, 478 F.2d at 867. In effect, these rules prohibit the use of the independent contractor defense when dealing with the public. *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (4th Cir. 1974). The intent of this rule is to make the lessee motor carrier responsible for the safety of the general public to the same extent as if it was the owner of the equipment. *White v. Excalibur Insurance Co.*, 599 F.2d 50, 53 (5th Cir. 1979). Safety is one of the paramount goals of these regulations. *Alford v. Major*, 470 F.2d at 135.

Courts have noted that "it is critical that ICC regulations and the lease mandated by them have supreme controlling significance." *Simmons v. King*, 478 F.2d at 866. They must be construed to override state law to the extent necessary to give effect to the intent of the federal regulatory program. *White v. Excalibur Insurance Co.*, 599 F.2d at 53; *Hartford Accident & Indemnity Co. v. Major*, 81 Ill. App. 2d 251, 226 N.E.2d 74 (1967). These regulations are generally construed so strictly that the lessee motor carrier is responsible and liable for all acts of the driver operating under its authority and placard, even if the motor carrier is unaware of the use of the equipment being made by the driver, including personal use. *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983); *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128 (3rd Cir. 1979); *Wellman v. Liberty Mutual Insurance Co.*, 496 F.2d 131 (8th Cir. 1974); *Mellon National Bank and Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473, 475 (3rd Cir. 1961); *Turnbow v. Hays Freight Lines, Inc.*, 15 Ill.

App. 2d 57, 145 N.E.2d 377 (1957); *Cox v. Bond Transportation, Inc.*, 249 A.2d at 588; *Felbrant v. Able*, 80 N.J. Super. 587, 194 A.2d 491 (1963); *Wycoff Trucking, Inc. v. Marsh Brothers Trucking Service, Inc.*, 58 Ohio St. 3d 261, 265, 569 N.E.2d 1049, 1053 (1991); *National Trailer Convoy, Inc. v. Saul*, 375 P.2d 922 (Okl. 1962).

The court in *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d at 137, n. 29, stated that the rule holding the lessee motor carrier financially responsible for injuries caused by leased tractor-trailers creates "**an irrebuttable presumption of an employment relationship between a driver and the lessee whose placards identify the vehicle.**" *See also Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 701 P.2d 575, 579 (1985); *Ohio Casualty Insurance Co. v. United Southern Assurance Co.*, 85 Ohio St. App. 3d at 532, 620 N.E.2d at 165; *Wycoff Trucking, Inc. v. Marsh Brothers Trucking Service, Inc.*, 58 Ohio St. 3d at 265, 569 N.E.2d at 1053. The intent is to make the motor carrier operating leased equipment liable to the public for damages. *Rodriguez v. Ager*, 705 F.2d at 1235. *See also Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d at 89.

Courts acknowledge that this rule seems harsh; however, it is necessary for public policy reasons. The goals of these rules are:

> (1) to prevent I.C.C. carriers from avoiding safety standards imposed by the I.C.C. by the simple practice of leasing equipment from non-regulated carriers; (2) to promote highway safety by insuring that drivers furnished by exempt carriers as part of the lease agreement do not violate safety regulations in the operation of leased equipment; and (3) to provide shippers and other members of the public with financially responsible carriers.

Indiana Refrigerator Lines, Inc. v. Dalton, 516 F.2d 795, 796 (6th Cir. 1975).

In *Hodges v. Johnson*, 52 F. Supp. 488, 490-491 (W.D. Va. 1943), the court recognized the need for such a rule, stating:

> Otherwise, the public might be entirely deprived of the safeguards to the public required by the Interstate Commerce Commission, by means of certificate holders evading their responsibility by the employment of irresponsible persons as independent contractors.

In *Rodriguez v. Ager*, 705 F.2d at 1236, the court noted:

> In summary ICC Regulation approach is applicable. The purpose is a praiseworthy one. It seeks to eliminate fly-by-night contracting by requiring the lessee of a vehicle who permits the equipment to be used on this basis to assure responsibility for the accidents of the driver of the vehicle which displays its insignia. To fail to uphold the ICC Regulations would result in injustice. Trucking equipment such as that here present has a capability for bringing about terrible injuries and damages to life. This is a typical illustration. Here all of the occupants except one child (who was seriously injured) were killed as a result of the truck being on the wrong side of the highway.

Id. The effect of the decision of the Supreme Court of Kansas nullifies these federal requirements. The very concerns Congress expressed about the financial solvency of interstate trucking companies and their drivers are present here. In this case, Printup was insolvent when judgment was taken against him.[1] The Kansas Supreme Court

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[1] Counsel for Smith has also been advised that Printup has now died. Thus, in this case, the $20,800.00 punitive damage judgment taken against Red Ball's driver is absolutely uncollectible if the decision of the Supreme Court of Kansas is allowed to stand.

not only ruled that Red Ball is not vicariously liable for his wanton acts that it authorized and ratified, but that Hartford is not required to pay the judgment even though Printup is an insured under the terms of the insurance policy. Congress' very purpose in enacting the federal Motor Carrier Safety Act was to prevent such events from occurring and to protect innocent members of the public, such as Smith, from obtaining judgments against interstate trucking companies and their drivers that are uncollectible because they are insolvent or otherwise judgment-proof. The Kansas Supreme Court nullified federal law on this subject.

C. Federal Law Requires That An Insurance Contract Providing Financial Responsibility For An Interstate Carrier Must Pay "Any Final Judgment" For Damages, Including Punitive Damages.

The primary reason the Interstate Commerce Act was amended was to protect the public from the tortious conduct of judgment-proof or insolvent operators of interstate motor vehicles. *Price v. Westmoreland*, 727 F.2d at 496. Prior to these amendments, unscrupulous motor carriers and operators used schemes involving leases or similar arrangements to insulate themselves from liability to the public for accidents and injuries caused by their drivers. This led to abuses from fly-by-night arrangements which damaged the development and maintenance of a sound national trucking system. These practices caused consequent damage to the public and were a menace to safety from the helter-skelter operation of thousands of unregulated vehicles on the nation's highways. *Simmons v. King*, 478 F.2d at 866-867.

In order to curb these abuses, Congress enacted 49 U.S.C. § 315 (now 49 U.S.C. § 10927[a][2]), which gave the Interstate Commerce Commission authority to require a motor carrier to file security to demonstrate proof of financial responsibility. Every motor carrier must prove it

is financially able to cover **all damages** for any accidents it may cause before it is permitted to operate. In fact, 49 U.S.C. § 10927(a)(2) states that the Interstate Commerce Commission may not issue a certificate or permit for operation to a motor carrier until such time as the motor carrier complies with the appropriate rules and regulations regarding the filing of securities, bonds, policies of insurance, qualification documents to become self-insured or similar proof of financial responsibility.

The statute specifies that an insurance policy can be an appropriate type of security to meet the requirements of the act. 49 U.S.C. § 10927(a)(1); 49 C.F.R. § 1043.1(a). *See also Transport Indemnity Co. v. Paxton National Insurance Co.*, 657 F.2d 657, 659, n. 3 (5th Cir. 1981). In fact, regardless of language contained in any contract or lease agreement, the motor carrier which carries any property or persons in interstate commerce must maintain public liability insurance unless other security is approved. 49 U.S.C. § 11107(a)(3); 49 C.F.R. § 1043.1.

The statute also requires that if an insurance policy is used as a surety bond it must contain language that the motor carrier's insurance company agrees to pay **"any final judgment recovered against such motor carrier for bodily injuries to . . . any persons resulting from the negligent operation, maintenance, or use of motor vehicles** under such certificate or permit, or for loss or damage to property of others." (Emphasis added.) 49 U.S.C. § 10927(a)(2); 49 C.F.R. § 1043.1(a). *See also Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d at 135.

The policy embodied in these statutes and regulations is to assure that injured members of the public will be able to obtain completely collectible judgments against negligent authorized carriers. *Canal Insurance Co. v. First General Insurance Co.*, 889 F.2d at 611; *Carolina Casualty Insurance Co. v. Underwriters Insurance Co.*, 569 F.2d 304, 312 (5th Cir. 1978). Thus, insurance policies issued to protect motor carriers are both surety bonds and insurance contracts.

The parties to a lease agreement are free to enter into agreements between themselves regarding the assignment of financial responsibility for losses. In particular, courts have often recognized that indemnification agreements between lessor owners and lessee motor carriers are valid – between themselves – so long as they are not intended to deprive the general public of the financial protection intended by the Interstate Commerce Act. *Carolina Freight Carriers Corp. v. Pitts County Transportation Co.*, 492 F.2d 243 (4th Cir. 1974); *Allstate Insurance Co. v. Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir. 1972). These agreements are upheld by courts if they do not have the effect of nullifying the responsibility provisions of the federal Motor Carrier Safety Act; however, such agreements will not be enforced if they have the effect of permitting a motor carrier to circumvent the control and financial responsibility provisions of the regulations. *Alford v. Major*, 470 F.2d at 135.

The Interstate Commerce Act has specific provisions which forbid a motor carrier from using any language in a lease or contract which may be construed as limiting or evading its financial responsibility to the general public. *Alford v. Major*, 470 F.2d at 134-135.

D. An Insurance Company Insuring An Interstate Motor Carrier Is Liable For Payment Of A Punitive Damage Award Entered Against The Motor Carrier.

Federal law controls the type of language an insurance company may place in any liability insurance policy issued and filed on behalf of a motor carrier. 49 C.F.R. § 1043.7(a). In exercising this power, the Commission has formulated a specific coverage endorsement which is required to be a part of all motor carrier liability policies. *Empire Fire & Marine Insurance Co. v. Guaranty National Insurance Co.*, 868 F.2d at 362. It is commonly known as "ICC Form BMC 90" or, in this case, Form MCS-90.

The instant policy contained language embracing the Form MCS-90 endorsement in two separate places. This language, mandated by federal law, states:

> In consideration of the premium stated in the policy to which this endorsement is attached, **the Company agrees to pay**, within the limits of liability[2] prescribed herein, **any final judgment** recovered against the insured **for bodily injury to or death of any person**, or loss of or damage to property of others (excluding injury to or death of the insured's employees while engaged in the course of their employment, and property transported by the insured, designated as cargo), **resulting from negligence in the operation, maintenance or use of motor vehicles** regardless of whether or not such motor vehicles are specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized by the Interstate Commerce Commission to be served by the insured or elsewhere.
>
> It is understood and agreed that **no condition, provision, stipulation or limitation contained in the policy**, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, **shall relieve the Company from liability or from the payment of any final judgment, irrespective of the financial responsibility of or lack thereof or insolvency or bankruptcy of the insured**. However, all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the Company, and **the insured agrees to reimburse the Company for any payment made by the Company on account**

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[2] $1,000,000.00.

> **of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.**
>
> It is understood and agreed that, **upon failure of the Company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the Company to compel such payment.** (Emphasis added.)

This endorsement is read into a motor carrier lease and associated insurance policies even if the endorsement is absent from the policy. *Hagans v. Glens Falls Insurance Co.*, 465 F.2d 1249, 1252 (10th Cir. 1972); *Argonaut Insurance Co. v. National Indemnity Co.*, 435 F.2d 718 (10th Cir. 1971); *Transport Indemnity Co. v. Carolina Casualty Insurance Co.*, 133 Ariz. at 406, 652 P.2d at 145.

This endorsement provides that no language of an insurance policy or its endorsements shall contain limitations which relieve the insurance company from liability for payment of **any final judgment rendered against its insured motor carrier**. The form also forbids the use of violations of the insurance agreement as a basis for claiming noncoverage. The insurance company has an obligation to pay **any final judgment obtained against the motor carrier** "irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy." ICC Form BMC 90. An insurance carrier cannot evade the duty to make the initial payment of compensation to an injured member of the public. *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d at 137. This has the effect of protecting the public should the motor carrier or its driver be financially insecure or otherwise unable to pay the judgment entered against it. The risk of inability to pay the judgment is shifted from the general

public to the insurance carrier who has issued the insurance policy as proof of financial security required by 49 U.S.C. § 10927(a)(2).

As previously stated, the endorsement covers any final judgment entered against any insured under the policy. *Federal Insurance Co. v. Allstate Insurance Co.*, 275 Md. 460, 479, 341 A.2d 399, 410 (1975). It also includes the driver of the truck as an additional insured under the policy, making the insurer liable for any judgment taken against the driver. *Carolina Casualty Insurance Co. v. Underwriters Insurance Co.*, 569 F.2d at 313-314; *Truck Insurance Exchange v. Transport Indemnity Co.*, 180 Mont. 419, 427, 591 P.2d 193 (1979).

The endorsement also serves to negate any language in an insurance policy which might be used to dilute or limit coverage required by law. *Empire Fire & Marine Insurance Co. v. Guaranty National Insurance Co.*, 868 F.2d at 358, 361 (endorsement negates any "excess coverage" clause in a liability policy). It establishes federal public policy which is supreme over any argument that conflicting state public policy controls.

Congress and the ICC intended this language would make the motor carrier's insurance company responsible for primary coverage for an accident, both as a matter of law and public policy. *Budd v. American Excess Insurance Co.*, 715 F. Supp. 981, 983 (D. Colo. 1989); *Nolt v. United States Fidelity & Guaranty Co.*, 329 Md. 52, 63, 617 A.2d 578, 583 (1993); *Allstate Insurance Co. v. Federal Insurance Co.*, 23 Md. App. 105, 326 A.2d 29, *aff'd and modified*, 275 Md. 460, 314 A.2d 399 (1974). Other courts have held that motor carriers may enter into agreements shifting ultimate financial responsibility for an accident; however, there must be "no diminution of recovery resulting to an injured third party." *Great West Casualty Co. v. Mallinger Truck Line, Inc.*, 640 S.W.2d 479, 485 (Mo. App. 1982).

The Kansas Supreme Court held that the purpose of federal law is only to pay compensation – that is, actual damages – for injuries. App. A-19. That is not true. The

cases cited herein universally declare that the purpose of the financial responsibility law (as well as insurance policies used as proof of financial responsibility) is to guarantee the payment of "**any final judgment**" entered against a motor carrier. There is no language in the statutes, rules and regulations, or the cases interpreting the same, that the purpose of the statutes is limited to payment of actual damages. There are no cases interpreting federal law which contain such a holding.

In fact, in *American Inter-Fidelity Exchange v. American Re-Insurance*, 17 F.3d 1018 (7th Cir. 1994), two insurers disputed who was ultimately responsible for paying deductibles on a trucking company's motor carrier policy which contained the mandatory ICC Form 90 endorsement. The policy in question was issued by American Inter-Fidelity to meet the proof of financial security required before the trucking company could obtain operating authority from the ICC. In referring to the statutory endorsement, the court stated that "b[y] this endorsement **the insurer promises to pay the full judgment** up to the regulatory minimum." *Id.* at 1021. (Emphasis added.) The court continued:

> Thus if the policy promises $700,000 of insurance after the insurer has paid a deductible of $50,000, **the insurer nonetheless agrees to pay any victim a total of $750,000**. Indeed, **the insurer must pay the victim in full even if the loss from the accident does not exceed the deductible, a circumstance under which ordinary insurance language does not kick in. It remains entitled to collect the deductible from its insured**. The endorsement provides: "all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company . . . that the company would not have been obligated to

> make under the provisions of the policy except for the agreement contained in this endorsement."[3] (Emphasis added.)

The court continued, stating, "[w]hat we know from the statutes, from 49 C.F.R. § 387.7, and from the mandatory endorsement, however, is that **carriers must protect potential victims from the first dollar of loss**." *Id.* (Emphasis added.)

The result is due to the dual purpose of a motor carrier liability policy – it functions as both an insurance policy and a surety bond. The surety provision is to guarantee that the motor carrier is financially responsible and that any member of the public injured will be guaranteed **full payment on any final judgment**, up to the limit of the surety bond/insurance policy. The court in *American Inter-Fidelity* recognized this, stating:

> The Secretary [of Transportation] does not care whether operators obtain insurance or surety bonds. 49 C.F.R. § 387.9. It is concerned with the protection of persons injured by trucking operations, not with how payment is assured. The difference between suretyship and insurance lies in the identity of the person ultimately responsible for the loss. An insurer pays the claimant without right of recourse against its client; a surety pays the claimant but is contractually entitled to reimbursement from its client. A contract providing $700,000 of insurance after the client pays a deductible of $50,000, but (because of the endorsement) requiring the carrier to pay as much as $750,000 to an injured person, is best understood as **$700,000 of insurance plus a surety bond of $50,000**. . . .

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[3] This exact language appears in the policy issued by Hartford.

> **If American Re-Insurance persuades the district court to separate the insurance and suretyship components of the policies, it may succeed only in showing that it owes the money to American Inter-Fidelity for a different reason. The premium American Inter-Fidelity receives from its clients is only partly for insurance; the rest is a fee for serving as surety for the deductible.** Because a reinsurer is entitled to only a portion of the insurance premium, the recognition that American Inter-Fidelity bears a suretyship risk may imply that American Re-Insurance owes restitution for the portion of the premium that does not pay for the "insurance" component of the package American Inter-Fidelity sells. (Emphasis added.)

Id. at 1022-23.

The Kansas Supreme Court went so far as to declare that the parties had not provided it with, and it had not been able to independently find, any decisions which supported Smith's position that the federally-mandated language "any final judgment" included punitive damages. App. A-18. That is not correct. Smith, in its brief, cited three cases which have such a holding. They are set forth below.

A prime example of this federally-mandated result is *Boyd v. Nationwide Mutual Insurance Co.*, 108 N.C. App. 536, 424 S.E.2d 168 (1993). There, the driver of a truck operating under the authority of an interstate motor carrier was involved in an accident which killed two people and injured another. The representative of one of the decedents filed suit against the trucking company and its driver. The jury later returned a verdict in favor of the plaintiff for $869,200.00 in actual and $500,000.00 in punitive damages against the driver and trucking company jointly, and an additional $3,500,000.00 in punitive damages against the trucking company.

Later, the plaintiff filed suit against the driver, the trucking company and its insurance carrier, seeking a

declaratory judgment that its insurance policies provided coverage for the punitive damage awards. The district court found that Nationwide's business auto policy provided $1,689,222.00 in coverage for punitive damages and its commercial umbrella policy provided $1,000,000.00 in coverage for punitive damages. Nationwide appealed.

The appellate court found coverage for punitive damages under both policies. In doing so, the court noted that Nationwide's business auto policy provided that it would "pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto."[4] In addition, the policy contained the ICC Form 90 endorsement which stated that "**the company agrees to pay, within the limits of liability prescribed herein, any final judgment recovered against the insured for bodily injury or death of any person, . . . resulting from negligence in the operation, maintenance, or use of motor vehicles. . . .** " (Emphasis added.) The court held that this language clearly provided coverage for punitive damages.

In arriving at its decision, the *Boyd* court relied on *Collins & Aikman Corp. v. The Hartford Accident & Indemnity Co.*, 106 N.C. App. 357, 416 S.E.2d 591 (1992). There, another interstate trucking company was involved in an accident wherein two people were killed. Their estates brought suit against the trucking company for both actual and punitive damages. The jury found in favor of plaintiffs and awarded $2.5 million in actual and $4 million in punitive damages. The case was later settled for $4.2 million.

Later, the insured brought a declaratory judgment suit against Hartford, the excess liability carrier, seeking determination that its excess policy covered the punitive damages award. Hartford answered, denying liability. It

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[4] This is the same language in Hartford's policy.

also filed a counterclaim seeking reimbursement of $733,112.75 it paid on the punitive damage judgment.

Under the terms of the policy, Hartford was required to pay on behalf of the insured any "ultimate net loss" in excess of the total applicable limit of any primary insurance coverage which resulted from bodily injury, personal injury, property damage or advertising injury to which the insurance policy provided coverage because of an occurrence. "Ultimate net loss" was defined as "**all sums which the insured and his or her insurers shall become legally obligated to pay as damages, whether by final adjudication or settlement**. . . . " 106 N.C. App. at 359-360.

The appellate court held that "the Hartford policy provides coverage for all sums which the insured . . . shall become legally obligated to pay as damages. . . . In the case at bar, the punitive damages arose from and were in consequence of a covered bodily injury." 106 N.C. App. at 363. The court continued, stating:

> [T]he Hartford policy in its definition section expressly provides that "damages" include damages for death which results from bodily injury to which the policy applies. Incorporating the policy's definitions into its coverage provision reveals that **the policy expressly provides coverage for all sums which the insured shall become legally obligated to pay as damages, including damages for death, because of bodily injury.** Nothing in this coverage provision suggests that the policy covers only compensatory damages. Therefore, **punitive damages are included in the policy's coverage provision.**

Id. (Emphasis added.) This case was later appealed to the Supreme Court of North Carolina, where it was affirmed in all respects. *Collins & Aikman Corp. v. The Hartford Accident & Indemnity Co.*, 335 N.C. 91, 436 S.E.2d 243 (1993).

In *Maryland Casualty Co. v. Baker*, 304 Ky. 296, 200 S.W.2d 757 (1947), the court reached the same result. Although the language in question did not come from a Form MCS-90 endorsement, identical statutory language existed requiring a surety bond for taxicabs before they could operate. The statute required that "[b]efore any authorization for the operation of a taxicab or city bus is granted by the division under KRS 281.450, the applicant shall file with the director a good and sufficient bond with adequate corporate surety, payable to the Commonwealth, binding the obligor to **pay any final judgment** rendered against him **arising out of the death** of or injury to any passenger, or loss of or damage to property while in transit, or **death of or injury to other persons** or damage to their property, or any act or omission connected with the operation of motor vehicles by the applicant." (Emphasis added.) The court held that the clear and unequivocal language of the statute included coverage for punitive damages.

The Supreme Court of Kansas admitted there were no decisions holding that punitive damages were not covered under a federal Form 90, but erroneously declared that there were no decisions interpreting the Form 90 to cover punitive damages. There are, in fact, as least three decisions holding that Form 90 covers punitive damages; however, the Kansas Supreme Court chose to ignore those decisions and the clear federal law on the subject. Instead, it was more interested in imposing its own state policy on federal law which has preempted this area of law and nullifying the federal law on the subject. This Court must step in and overrule the decision of the Kansas Supreme Court.

E. Even If The Insurance Policy Did Not Provide Coverage For Punitive Damages, Federal Law Holds That An Insurance Contract Providing Financial Responsibility For An Interstate Carrier Is A Surety For The Truck Company And Must Pay "Any Final Judgment" For Damages, Even Punitive Damages Not Covered Under The Terms Of The Insurance Policy.

The clear language of the Form 90 requires an insurance carrier issuing an interstate trucking liability policy to pay "any final judgment" entered against the trucking company even if the judgment is not covered by the terms of the liability policy. The insurance carrier cannot raise noncoverage as a defense. If the company pays a final judgment that is not covered by the terms of the policy, it is then permitted to maintain an action against the trucking company to recover any sums it paid to the injured party that is should not have been required to pay. This is the surety language of the insurance policy required by federal law.

In other words, the endorsement provides "a means of recovery to the injured public, even where the incident or vehicle involved in the accident is outside the coverage of the underlying policy." *Tope v. Pamco, Inc.*, 1993 WL 308346, p. 6 (Ohio App. 1993). *See, also, Industrial Indemnity Co. v. Truax Truck Line, Inc.*, 45 F.3d 986 (5th Cir. 1995) (no defense to payment to injured party that vehicle was a noncovered vehicle). The purpose of the federal statute and regulations which require this endorsement is to "ensure that an ICC carrier has independent financial responsibility to pay for losses sustained by the general public arising out of its trucking operations." *Occidental Fire & Casualty Co. v. International Insurance Co.*, 804 F.2d 983, 986 (7th Cir. 1986). *See also Maryland Casualty Co. v. City Delivery Service, Inc.*, 817 F. Supp. 525, 529-30 (M.D. Pa. 1993).

Upon payment of any final judgment, the insurance company then has the right to proceed against the motor

carrier for reimbursement of any amounts paid which the insurance company would not have been obligated to pay under the terms of the insurance policy. *Id. See also Transport Indemnity v. Rollins Leasing Corp.*, 14 Wash. App. 360, 364-65, 541 P.2d 1226, 1229 (1975). This right of reimbursement has caused some courts to conclude that the endorsement is a hybrid between an ordinary insurance contract and a financial responsibility bond. *Tope v. Pamco, Inc.*, 1993 WL 308346 (Ohio App. 1993).

It is important to understand how the language of the policy works in order to understand the issues in this case. An injured party is entitled to initially take action against the insurance carrier to collect any final judgment entered against a motor carrier. There is no requirement that the motor carrier must be insolvent or otherwise unable to satisfy the judgment. The insurance carrier is not permitted to use any noncoverage defenses or policy violations as a defense. It is obvious the ICC foresaw circumstances in which the insurance carrier would pay final judgments because of events not insured by the terms of the liability policy, because the language of the endorsement permits the insurance carrier to then take action against the motor carrier to recover any payments made to the injured party that are not insured under the terms of the insurance policy. This is the surety bond portion of the insurance policy at work. An excellent example of the surety need to pay any final judgment would be for payment of punitive damages which might not be insured.

The Kansas Supreme Court refused to give recognition to this policy language and the federal law behind it. In fact, the court did not even address this issue in its written opinion. App. A-26. It simply ignored the issue as raised by Smith and summarily denied relief on this point. Under federal law, Smith was clearly entitled to this as the minimum relief available in this case. Hartford, as surety, should be required to pay the punitive damage judgment entered against Printup. Even if the insurance policy does not cover punitive damages, the

policy is a surety bond which must cover "any final judgment." Hartford may then seek recovery against Red Ball or Printup. If it cannot make such a recovery, it should bear the risk of loss, not a member of the general public. *See, e.g., Hartford Insurance Co. v. Occidental Fire & Casualty Co.*, 908 F.2d 235 (7th Cir. 1990). Once again, by refusing to apply federal law, the Kansas Supreme Court shifted the risk of loss from the insurance carrier to the injured public, something Congress specifically intended never to happen in a case such as this. Such a clear nullification of federal law should not be allowed to stand.

CONCLUSION

The Kansas Supreme Court clearly does not like punitive damage awards and clearly does not like federal law in an interstate trucking case providing insurance coverage for payment of such awards. In this case, it clearly ignored controlling federal law on the subject. In fact, it nullified federal motor carrier law to impose its own policy in place of Congressional policy. This Court should grant petitioners' application for a writ of certiorari and order this matter proceed to a full hearing.

Respectfully submitted,

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Admitted to the United States Supreme Court in 1981

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 74,656

THE HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant/Cross-appellee,

v.

AMERICAN RED BALL TRANSIT COMPANY, INC., and ALBERT PRINTUP, *Appellees,* and BARRY L. SMITH, Administrator of the Estate of Glen C. Smith, deceased, *et al.*,
Appellees/Cross-appellants.

SYLLABUS BY THE COURT

1.

This court's review of conclusions of law is unlimited.

2.

Ordinarily the validity of a contract and its construction are determined by the law of the state where the contract was made. There is an exception to this rule where the contract contravenes the settled public policy of the state whose tribunal is invoked to enforce the contract.

3.

In Kansas, exemplary damages are awarded for purposes of punishment and deterrence. Kansas public policy requires that payment of punitive damages rest ultimately as well as nominally on the party who committed the wrong; otherwise such damages would often serve no useful purpose. The objective to be attained in

imposing punitive damages is to make the culprit feel the pecuniary punch, not the culprit's insurer.

4.

Generally, federal preemption of state law occurs only if state law conflicts with or frustrates the federal scheme or Congress sought to occupy the field to the exclusion of the states. There is a reluctance to infer preemption, and there is an assumption that Congress did not intend to displace state law.

5.

A conflict between federal and state law in regard to federal preemption requires a positive and direct conflict in order to make coexistence of the two laws an impossibility. It is necessary that the state law in its application to the same field contravene federal public policy or cause a different result or consequence.

6.

In making a determination concerning federal preemption, a court should examine those concerns emphasized by Congress in enacting the legislation. State law should be preempted only to the extent necessary to protect achievement of the purposes of the federal act in question.

7.

The purpose of the Interstate Commerce Commission (ICC) statutory law and regulations under the Federal Motor Carrier Safety Act is to ensure that a financially responsible party will be available to compensate third persons injured in a collision with an ICC carrier.

8.

K.S.A. 40-2,115(a) provides that it is not against public policy to obtain insurance coverage for punitive damages awarded against an employer based upon corporate vicarious liability.

9.

Before the passage of K.S.A. 40-2,115(a), this court had adopted the complicity rule set out in the Restatement (Second) of Torts § 909 (1977). The complicity rule generally provides that a corporation might be held liable for punitive damages resulting from acts of its employees only when it has directed or ratified those acts.

10.

In 1987, the Kansas Legislature adopted K.S.A. 60-3701 and based corporate liability for punitive damages for the conduct of its employees upon the complicity rule not a vicarious liability rule. There is no corporate employer liability under the complicity rule and K.S.A. 60-3701(d)(1) unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the employer.

11.

In Kansas, a corporation may not be held liable under a vicarious liability theory for punitive damages based upon the conduct of its employees; punitive damages against a corporation for the conduct of its employees are awarded on the basis of the complicity rule expressed in *Kline v. Multi Media Cablevision, Inc.*, 233 Kan. 988, 666 P.2d 711 (1983), and K.S.A. 60-3701. Under the facts of

this case, K.S.A. 40-2,115(a), based upon a corporate vicarious liability rule, does not apply.

Appeal from Sedgwick district court, D. KEITH ANDERSON and RON ROGG, judges. Opinion filed June 6, 1997. Affirmed in part and reversed in part.

Philip L. Bowman, of Adams, Jones, Robinson & Malone, Chartered, of Wichita argued the cause, and *Donald W. Bostwick*, and *Clifford L. Malone, of* the same firm, were with him on the briefs for appellant/cross-appellee Hartford Accident & Indemnity Company.

Randall E. Fisher, of Wichita, argued the cause and was on the brief for appellees/cross-appellants Smith *et al.*

Terrill D. Albright, of Baker & Daniels, of Indianapolis, Indiana, argued the cause and Ronald D. Gifford, of the same firm, and *James L. Grimes, Jr.*, and *Jay F. Fowler*, of Foulston & Siefkin, of Topeka, were with him on the briefs for appellee American Red Ball Transit Company, Inc.

The opinion of the court was delivered by

DAVIS, J.: Hartford Accident & Indemnity Company (Hartford), the insurer of American Red Ball Transit Company, Inc., (Red Ball) filed a declaratory judgment action requesting a determination that it was not obligated to indemnify Red Ball or Albert Printup for punitive damages. The district court held that Hartford was obligated to indemnify Red Ball, but not Printup. Hartford appeals from the court's decision with regard to Red Ball, and Barry L. Smith, administrator of the estate of Glen C.

Smith, deceased, cross-appeals from the decision with regard to Printup.

We are called upon to answer the questions of whether Kansas law applies in this case; whether federal law preempts Kansas law; and, if not, whether under the facts of this case there is a Kansas policy against insuring for punitive damages. While the parties raise and discuss additional issues, a resolution of the above three issues will resolve this case.

We conclude that Kansas law applies and is not preempted by federal law. We further conclude that under the facts of this case, a state policy against insurance coverage for punitive damages exists. We, therefore, reverse the judgment that Hartford is liable under its policy for punitive damages awarded against Red Ball. In all other respects, we affirm.

FACTS

The underlying facts of the present case are set forth in *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993) *(Smith v. Printup I)*. That same case was also the subject of a second appeal, *Smith v. Printup*, No. 76,025, this day decided *(Smith v. Printup II)*. Highly summarized, Albert Printup jackknifed his moving van and collided with a pickup truck, killing both occupants of the truck. Carolyn S. Elliott died immediately while Glen C. Smith survived for some minutes before dying at the scene.

Printup was employed by Southwest Movers, Inc., (Southwest) but had been "leased out" to Red Ball for 4 to 5 years preceding the accident. The relatives of Elliott and

Smith sued Printup, Southwest, and Red Ball for wrongful death, and the administrator of the Smith estate sued the same defendants for Smith's pain and suffering. The trial court allowed the Smith plaintiffs (Smith) to amend their complaint to seek punitive damages in accordance with K.S.A. 60-3701 against Southwest, Printup, and Red Ball in conjunction with the survivor action.

In addition to awarding compensatory damages in both wrongful deaths, the jury determined that Smith was entitled to punitive damages from Red Ball and Printup but not from Southwest in Smith's survival action. The focus of *Smith v. Printup I* related to punitive damages. We set aside the amount of punitive damages awarded against Red Ball and Printup, reversed the jury determination that Smith should not be awarded punitive damages against Southwest, and remanded with specific instructions. 254 Kan. at 359-60. Upon completion of the remand proceedings, the trial court set the punitive damage award against Red Ball at $100,000 and against Printup at $20,800. A jury again determined that Southwest was not liable for any punitive damages. In *Smith v. Printup II*, we affirmed both the trial court's and the jury's determinations. Southwest is not a party to this appeal. While Printup does not respond to this appeal, the coverage issues concerning punitive damages against Red Ball and Printup remain.

The policy issued by Hartford was in effect at the time of the accident and contained the necessary Interstate Commerce Commission (ICC) form BMC 90 endorsements. Both Red Ball and Printup were "insureds" under the terms of the policy. Based upon

undisputed facts, the trial court determined that Hartford's policy covered the punitive damage award against Red Ball but not the punitive damage award against Printup. While the court decided other matters, the appeals in this case involve only the question of insurance coverage for punitive damage awards against Red Ball and Printup. Additional facts necessary to resolve insurance coverage of punitive damages are set forth in the opinion.

STANDARD OF REVIEW

The parties do not dispute the facts. The only questions before this court involve questions of law over which this court's review is unlimited. *Gillespie v. Seymour,* 250 Kan. 123, 129, 823 P.2d 782 (1991).

CHOICE OF LAW

Red Ball contends that Indiana law applies because it is the state where the insurance policy was issued. See *Simms v. Metropolitan Life Ins. Co.,* 9 Kan. App. 2d 640, 685 P.2d 321 (1984). The trial court, relying upon *Norfolk & W. Ry. Co. v. Hartford Acc. & Indem. Co.,* 420 F. Supp. 92, 94 (N.D. Ind. 1976), determined that Indiana law required the issue of punitive damages to be determined under the law of the state with the most "intimate contact" with the transaction. Thus, the trial court held that "[t]he meritorious position of Red Ball [application of the law where the contract was entered into applies] sends us to Indiana and, under Indiana law, back to Kansas for its interpretation of the issues."

We agree that Kansas law applies but not for the reasons set forth by the trial court. The application of Kansas law is controlled by St. *Paul Surplus Lines Ins. Co. v. International Playtex, Inc.*, 245 Kan. 258, 777 P.2d 1259 (1989), *cert. denied* 493 U.S. 1036 (1990). In *St. Paul*, the losing defendants in a successful products liability case appealed the trial court's decision that Kansas public policy precluded their recovery of assessed punitive damages from their liability insurers. The defendants argued that the trial court erred in applying Kansas law to deny insurance coverage of the punitive damages relying on the *lex loci* rule in *Simms*, 9 Kan. App. 2d 640. We acknowledged *Simms* but noted that there is an exception to the *lex loci* rule where the contract contravenes the settled public policy of the state whose tribunal is invoked to enforce the contract. 245 Kan. at 269-70. Applying Kansas law and Kansas public policy, we said:

> "If we were to refuse to apply Kansas law on the issue of punitive damages, we would thwart the purposes for which the policy was adopted.
>
> > 'Where exemplary damages are awarded for purposes of punishment and deterrence, as is true in this state, public policy should require that payment rest ultimately as well as nominally on the party who committed the wrong; otherwise they would often serve no useful purpose. The objective to be attained in imposing punitive damages is to make the culprit feel the pecuniary punch, not his guiltless guarantor.' *Koch v. Merchants Mutual Bonding Co.*, 211 Kan. [397, 405, 507 P.2d 189 (1973)].

> "The objective of the policy is to prevent wrongful acts against the citizens of the State of Kansas. . . .
>
> . . . .
>
> "A finding that Kansas public policy does not apply to the punitive damages in the *O'Gilvie* action would effectively excuse [the corporate defendant] from the consequences of its reckless behavior with this state. Failure to apply Kansas law would establish an undesirable precedent for other tort and product liability actions. In any product liability action which involves an out-of-state manufacturer, the manufacturer could avoid the application of Kansas public policy where the manufacturer had contracted outside the State of Kansas for insurance of punitive damages. This would result in the uneven application of the public policy. Kansas tortfeasors would be required to feel the 'pecuniary punch' while out-of-state tortfeasors could require their 'guiltless' insurance companies to pay such damages. Out-of-state tortfeasors who contracted with out-of-state carriers would, therefore, not be subject to deterrence for committing reckless acts in Kansas." 245 Kan. at 272-73.

In St. *Paul,* the injured party was a Kansas resident fatally injured by a defective product that was used in Kansas. Here, two Kansas residents were fatally injured in an accident that occurred in Kansas. The argument that application of Indiana law is necessary to maintain a uniform interpretation of the insurance policy Red Ball contracted with Hartford finds support in the traditional notions underlying the *lex loci* rule. However, the interest

of Kansas exceeds Indiana's interest in the resolution of the instant controversy. See 245 Kan. at 270.

FEDERAL PREEMPTION

Generally, federal preemption of state law occurs only if state law conflicts with or frustrates the federal scheme or Congress sought to occupy the field to the exclusion of the states. There is a reluctance to infer preemption, and there is an assumption that Congress did not intend to displace state law. *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./ R.I., Inc.*, 507 U S. 218, 122 L. Ed. 2d 565, 113 S. Ct. 1190 (1993).

The parties do not suggest that Congress has expressly preempted this field. Neither do the parties argue that Congress has sought to occupy the field to the exclusion of the states. Instead, Smith argues that state law conflicts with the federal law and, thus, the preemption doctrine applies.

We have recently reviewed the federal preemption doctrine in *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 607-08, 886 P.2d 869 (1994), *cert. denied* 133 L. Ed. 2d 38 (1995). *Jenkins* affirms the general rule regarding preemption:

> "The doctrine of federal preemption is founded on the Supremacy Clause, U.S. Const. art. VI, cl. 2:
>
> > 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State

> shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

Thus, any 'state law that conflicts with federal law is "without effect." ' *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 120 L. Ed. 2d 407, 422, 112 S. Ct. 2608 (1992). The preemption analysis presumes that police powers historically left to the states are not superseded by federal law. [Citations omitted.] The presumption against federal preemption of state law may be overcome if Congress intended preemption. [Citations omitted.] Preemption may be express or implied:

> 'Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." [Citation omitted.] In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law [citation omitted], or if federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it." ' [Citations omitted.]' *Cipollone*, 420 L. Ed. 2d at 422-23."

In *Elkins* v. *Showcase, Inc.*, 237 Kan. 720, 704 P.2d 977 (1985), we discussed the meaning of conflict between federal and state law in regards to preemption. We said that the conflict between the two laws must be positive and direct in order to make coexistence of the two laws an impossibility. It is necessary that the state law in its application to the same field contravene federal public policy or cause a different result or consequence. 237 Kan.

at 727; see *Watkins v. H. O. Croley Granary*, 555 F. Supp. 458, 460 (N.D. Ga. 1982).

In *Goben v. Barry*, 237 Kan. 822, Syl. ¶ 3, 703 P.2d 1378 (1985), we said: "In making a determination of federal preemption, a court should examine those concerns emphasized by Congress in enacting the legislation. State law should be preempted only to the extent necessary to protect achievement of the purposes of the federal act in question."

The federal Motor Carrier Safety Act, 49 U.S.C. § 10927 (1994), provides in relevant part:

> "(a)(1) The [Interstate Commerce] Commission [ICC] may issue a certificate under section 10922 or 10530 or a permit under section 10923 only if the carrier . . . applying for such certificate files with the Commission a bond, insurance policy, or other type of security approved by the Commission, in an amount not less than such amount as the Secretary of Transportation prescribes. . . . The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate or permit, or for loss or damage to property . . . or both."

Pursuant to this statutory authority, the ICC promulgated regulations in 49 C.F.R. § 1043 (1995), relating to insurance coverage, and 49 C.F.R. § 1057 (1995), regarding

the lease and interchange of vehicles among motor carriers. Section 1043 requires that all interstate motor carriers obtain a certificate with the ICC. The regulations specify that

> "no certificate or permit shall be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the Commission surety bonds, certificates of insurance, proof of qualifications as self-insurer, or other securities or agreements, in the amounts prescribed in § 1043.2, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation subject to subchapter II, chapter 105, subtitle IV of title 49 of the U.S. Code, or for loss of or damage to property of others. . . . " 49 C.F.R. § 1043.1(a)(1). (Emphasis added.)

The ICC regulations provide for minimum dollar amounts of coverage. 49 C.F.R. § 1043.2. In addition, "[e]ach policy of insurance in connection with the certificate of insurance which is filed with the Commission, shall be amended by attachment of the appropriate endorsement prescribed by the Commission or the Department of Transportation and the certificate of insurance filed must accurately reflect that endorsement." 49 C.F.R. § 1043.6(c). The same minimum insurance coverage is required from a carrier who leases vehicles from another interstate carrier. 49 C.F.R. § 1057.12(j)(1) (1995).

There is a clear consensus among jurisdictions regarding the policy underlying 49 U.S.C. § 10927. One court stated the purpose as follows: "The purpose of ICC

statutory law and regulations is to ensure that a financially responsible party will be available to compensate third persons injured in a collision with an ICC carrier." *Maryland Cas. Co. v. City Delivery Service, Inc.*, 817 F.Supp. 525, 530 (M.D. Pa. 1993).

The United States Supreme Court discussed the policy behind the financial responsibility statute and rules promulgated by the ICC thereunder:

> It is apparent . . . that sound transportation services and the elimination of the problem of a transfer of operating authority, with its attendant difficulties of enforcing safety requirements and of fixing financial responsibility for damage and injuries to shippers and members of the public, were the significant aims and guideposts in the development of the comprehensive rules." *Transamerican Freight v. Brada Miller*, 423 U.S. 28, 37, 46 L. Ed. 2d 169, 96 S. Ct. 229 (1975).

See *Carolina Cas. Ins. Co. v. Underwriters Ins. Co.*, 569 F.2d 304, 312 (5th Cir. 1978); *Carolina Cas. Ins. Co. o. Transport Indem. Co.*, 533 F. Supp. 22 (D.S.C. 1981), *aff'd* 676 F.2d 690 (4th Cir.), *cert. denied* 459 U.S. 829 (1982). See also *Canal Ins. Co. v. First General Ins. Co.*, 889 F.2d 604, 610 (5th Cir. 1990). ("[T]he ICC is empowered to promulgate regulations to insure that motor carriers operating tractors or trailers as lessees under leasing arrangements . . . assume total responsibility for the operation of their rented vehicles, including obtaining adequate insurance."). With one exception, the parties do not cite to any case that suggests a different legislative purpose. That exception, *Alford v. Major*, 470 F.2d 132, 135 (7th Cir. 1972), addressed the

broader policy underlying the passage of the entire Federal Motor Carrier Safety Act requiring the maintenance of leased equipment and the supervision of borrowed drivers.

A majority of jurisdictions have held that there is a limit to the extent of this federal policy and that 49 U.S.C. § 10927 does not preempt all state law or regulations relating to insurance coverage of interstate motor carriers. For example, the Seventh Circuit Court of Appeals, in discussing the doctrine of federal preemption with regard to the question of which carrier provided primary coverage, said:

> "The purpose of the federal statute and regulations is to ensure that an ICC carrier has independent financial responsibility to pay for losses sustained by the general public arising out of its trucking operations. However, once it is clear that there are sufficient funds available to safeguard the public, the inquiry changes; '[t]he pertinent question is whether the federal policy of assuring compensation for loss to the public prevents courts from examining the manner in which private agreements *or state laws* would otherwise allocate the ultimate financial burden of the injury.' *[Carolina Cas. Ins. Co. v.] Insurance Co. of North America*, 595 F.2d [128,] 138 [(3d Cir. 1979)] (emphasis added). We agree with the majority view that 'I.C.C. public policy factors are frequently determinative where protection of a member of the public is at stake, but those factors cannot be invoked by another insurance company which contracted to insure a specific risk and which needs no equivalent protection.' [*Carolina Cas. Ins. Co. v.*] *Underwriters [Ins. Co,]* 569 F.2d [302,] 313 [(1978)]. Thus, we hold that

> ICC policy does not alter the application of the Indiana statute, which places primary coverage on [the defendants]. We would emphasize, however, that were it not for the Indiana statute, the policy provisions as to coverage would be controlling." *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133 (7th Cir. 1986).

American Surety Company of New York v. Gold, 375 F.2d 523 (l0th Cir. 1966), provides some help in analyzing the preemption question. In that case, the insurance company acknowledged its responsibility for compensatory damages assessed against insured but denied any liability for punitive damages. The court acknowledged Kansas' policy against insurance for punitive damages. The court rejected the argument that a Kansas public policy against insurance for punitive damages was superseded by the Kansas Motor Vehicle Safety Responsibility Act. 375 F.2d at 527-28.

The *Gold* court stated that the legislative purpose of acts like the Kansas Motor Vehicle Safety Responsibility Act is " 'to provide compensation for innocent persons that might be injured through faulty operation of motor vehicles.' " 375 F.2d at 527. Here, the purpose of the federal act, not unlike the Kansas Motor Vehicle Safety Responsibility Act, is to require adequate security or insurance from those operating under an ICC certificate in order that members of the public will be fairly compensated for losses occurring by reason of the negligent operation of ICC vehicles traveling throughout the country. The key under both the state and federal law is compensation.

The federal Motor Carrier Safety Act uses language which relates to security for compensating injured persons by reason of negligent operation:

> *"The security must be sufficient to pay,* not more than the amount of the security, *for each final judgment against the carrier for bodily injury to, or death of, an individual* resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate or permit, or for loss or damage to property . . . or both." (Emphasis added.) 49 U.S.C. § 10927.

The purpose of the Act is to ensure that financial security will be available to compensate injured parties. *Maryland Cas. Co.*, 817 F. Supp. at 530.

The federal Motor Carrier Safety Act contains no language which expressly includes or excludes punitive damages. We understand the argument of Smith to be that the language in the Act "each final judgment" directly conflicts with Kansas law because such language requires coverage of punitive damages. Thus, we inquire whether Congress has provided any information concerning its intent with regard to punitive damage coverage.

The predecessor of 49 U.S.C. § 10927 is § 215 of the federal Motor Carrier Act, 1935. Act of Aug. 9, 1935, ch. 498, § 215, 49 Stat. 557 (1935). The first sentence of this section stated:

> "No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a

> self-insurer or other securities or agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, *any final judgment* recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others." (Emphasis added.)

Neither the parties nor our independent research has located specific guidance on the question of whether Congress intended to include punitive damages. The Congressional Record of 1935, which details the events occurring on the floors of the U.S. House and Senate, is silent with regard to the language in question. In addition the contemporary legislative compilation, Wagner, A Legislative History of the Motor Carrier Act, 1935 (1935), in its discussion on pages 67-68 of relevant statements of legislators on certain words and phrases, does not provide any insight on whether Congress intended to include punitive damages or even whether Congress considered the issue of punitive damages. Moreover, the Hawkins Index-Digest-Analysis of Decisions under the Interstate Commerce Act does not report any agency decisions on the issue of insurance of punitive damages under the federal Motor Carrier Act.

Although Congress has made changes in the above language and related sections of the Act, it consistently has stated that no substantive change in the law was intended. See, *e.g.*, H.R. Rep. No. 95-1395 (1978),

reprinted in 1978 U.S. Code Cong. & Ad. News 3009, 3013 ("The purpose of the bill is to restate in comprehensive form, without substantive change, the Interstate Commerce Act and related laws. . . . In the restatement, simple language has been substituted for awkward and obsolete terms, in superseded, executed, and obsolete statutes have been eliminated.").

Legislative history notes following 49 U.S.C. § 10927 explain that for clarity, the word "each" replaced "any."

Lacking any express evidence of congressional intent, we return to the basic policy concerns emphasized by Congress in passing § 10927 of the federal Motor Carrie Safety Act. See *Goben v. Barry*, 237 Kan. 822, Syl. ¶ 3. As previously stated, the purpose was "to ensure that a financially responsible party will be available to compensate third persons injured in a collision with an ICC carrier. *Maryland Cas. Co.*, 817 F.Supp. at 530.

Ensuring that a financially responsible party is available when a member of the public is injured by an interstate motor carrier does not conflict with the application of Kansas' public policy concerning insurance coverage for punitive damages. Federal law requires that adequate security or insurance coverage be available for any compensatory damages suffered by the public. Punitive damages are in effect a windfall to an injured plaintiff and are intended to punish a wrongdoer rather than protect the injured party. We conclude that the doctrine of federal preemption does not prevent the application of Kansas law and policy on the issue of insurance coverage for punitive damages.

INSURANCE COVERAGE FOR PUNITIVE DAMAGES

As discussed above, the public policy against the insurability of punitive damages by a wrongdoer was first expressed in *Koch v. Merchants Mutual Bonding Co.*, 211 Kan. 397, 507 P.2d 189 (1973). The policy was extended in *Guarantee Abstract & Title Co. v. Interstate Fire & Cas. Co.*, 228 Kan. 532, 618 P.2d 1195 (1980). In that case, an employer argued that the policy did not apply in cases where an employer was assessed punitive damages vicariously. The court stated:

> "[W]e reject such a rule, regardless of whether liability is incurred vicariously or directly. It is against the public policy of this state to allow a wrongdoer to purchase insurance to cover punitive damages [citation omitted], and we interpret that rule to include any person who has incurred such liability regardless of whether the liability resulted from the insured's own acts or those of his employee, servant or agent." 228 Kan. at 535.

After *Guarantee* was decided, a bill involving insurance coverage for punitive damages was introduced in the Kansas House in 1983. The bill was enacted during following legislative session and became K.S.A. 40-2,115. The legislative history of K.S.A. 40-2,115 demonstrates that it was enacted in reaction to our decision in *Guarantee*. K.S.A. 40-2,115(a) provides:

> "It is not against the public policy of this state for a person or entity to obtain insurance covering liability for punitive or exemplary damages assessed against such insured as the result of acts or omissions, intentional or otherwise, of such insured's employees, agents or

> servants, or of any other person or entity for whose acts such insured shall be vicariously liable, without the actual prior knowledge of such insured."

This statute was introduced prior to our decision in *Kline v. Multi-Media Cablevision Inc.*, 233 Kan. 988, 666 P.2d 711 (1983), but did not pass until after *Kline* was decided. The time line involved in the enactment of K.S.A. 40-2,115 is as follows:

2-24-83 Representative Vancrum testified regarding H.B. 2062 (a version of what was to become K.S.A. 40-2,115) that the bill was intended to very simply reverse the ruling in the *Guarantee Abstract* case.

7-15-83 Opinion in *Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. 988, 666 P.2d 711 (1983), announced.

2-24-84 Representative Vancrum again testified regarding H.B. 2876 (a version of what was to become K.S.A. 40-2,115): "The bill would merely reverse the 1980 Supreme Court ruling in the *Guarantee Abstract* case."

4-26-84 Effective date of K.S.A. 40-2,115.

The legislative history involving K.S.A. 40-2,115 does not mention or make reference our decision in *Kline.*

Kline involved the following certified question from the United States District Court for the District of Kansas:

> " 'Under Kansas law, may a corporation be held liable for punitive damages arising from an act of an agent or employee, within the scope of the agent's or employee's employment, when the corporation, through its board of directors

> or an officer, has neither directed, authorized nor ratified the act.' " 233 Kan. at 989.

The plaintiff in *Kline* urged this court to adopt a "vicarious liability" rule that a corporation be held liable for punitive damages whenever the employee, acting within the scope of employment, is liable. We considered the deterrence aspect of this rule and recognized that the vicarious liability rule was "followed by a majority of the courts." 233 Kan. at 990.

As a second possible answer to the certified question, we recognized what has been referred to as the "complicity rule" expressed in Restatement (Second) of Torts § 909 (1977). This rule basically provides that "a corporation might be held liable for punitive damages resulting from acts of its employees only when it has directed or ratified those acts." 233 Kan. at 990.

After a thorough discussion of the merits of each rule, we held:

> "We hereby adopt the complicity rule set out in the Restatement (Second) of Torts § 909 (1977). Although couched in terms of master's and principal's liability for punitive damages arising out of acts of servants and agents, the rules are equally applicable to corporations.
>
> "Thus we answer the certified question. A corporation is not liable for punitive damages for an employee's tortious acts committed within the scope of his employment unless (a) the corporation or its managerial agent authorized the doing and manner of the act; (b) the employee was unfit and the corporation or its managerial agent was reckless in employing or retaining him; (c) the employee was employed

> in a managerial capacity and was acting in the scope of employment; or (d) the corporation or its managerial agent ratified or approved the act of the employee." 233 Kan. at 994.

The complicity rule has been followed by this court in *Smith v. United Technologies,* 240 Kan. 562, 731 P.2d 871 (1987) (upholding punitive damage award against corporation based upon acts by managerial personnel in the scope of their employment); *Gould v. Taco Bell,* 239 Kan. 564, 571, 722 P.2d 511 (1986) (defendant corporation held liable for punitive damages where managerial personnel's acts were wanton); and *Plains Resources, Inc. v. Gable,* 235 Kan. 580, 682 P.2d 653 (1984) (upholding award of punitive damages against corporation where corporate employer was liable for negligent hiring and also directed and ratified tortious acts of employee); see *Southern American Ins. v. Gabbert-Jones, Inc.,* 13 Kan. App. 324, 769 P.2d 1194 (1989).

In 1987, the Kansas Legislature partially adopted the complicity rule set forth in *Kline.* K.S.A. 60-3701. Under the provisions of K.S.A. 60-3701(d), the legislature provided:

> "In no case shall exemplary or punitive damages be assessed pursuant to this section against:
>
> (1) a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer."

While K.S.A. 60-3701 narrowed our holding in *Kline* by specifying that only under certain circumstances may

punitive damages be assessed against an employer for the conduct of its employees, the statute partially expresses the complicity rule adopted by this court in *Kline.*

K.S.A. 60-3701(d)(1) limits punitive damages assessed to an employer only in circumstances where the employer has ratified or authorized the act of the employee. Since our decision in *Kline,* the policy of Kansas regarding assessment of punitive damages against a corporation is that such damages may be assessed in accord with the complicity rule but not upon a vicarious liability rule.

The enactment of K.S.A. 40-2,115, after our decision in *Kline,* permits the purchase of insurance for punitive damages under a vicarious liability rule. K.S.A. 40-2,115 was passed in reaction to *Guarantee,* 228 Kan. 532, but the legislature did not consider our decision in *Kline. Kline* controls from the date of the decision in 1983. Since K.S.A. 40-2,115 was passed in 1984 and was based upon a vicarious liability rule, the statute has no effect in Kansas in cases where punitive damages are awarded on the basis of the complicity rule expressed in *Kline.* K.S.A. 40-2,115(a) conflicts with our decision in *Kline* and also conflicts with the provisions of K.S.A. 60-3701(d) passed by the Kansas Legislature in 1987.

In Kansas, a corporation may be held liable for its own wanton acts. *Flint Hills Rural Elec. Co-op Ass'n. v. Federated Rural Elec. Ins. Corp.,* No. 77,480, filed May 30, 1997; *Cerretti v. Flint Hills Rural Electric Co-op Ass'n,* 251 Kan. 347, 366, 837 P.2d 330 (1992). However, since our decision in *Kline,* and presently under the provisions of K.S.A. 60-3701(d), a corporation may not be held liable

for the wanton acts of its employee unless under the complicity rule. There is no corporate employer liability under the complicity rule and K.S.A. 60-3701(d) "unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the . . . employer." K.S.A. 60-3701(d)(1). The provisions of K.S.A. 40-2,115(a) do not apply in this case.

There remains in Kansas, under the facts of this case, a policy against insurance coverage for punitive damages. That policy is best expressed in *St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc.*, 245 Kan. 258, 273, 777 P.2d 1259 (1989):

> "A finding that Kansas public policy does not apply to the punitive damages in the *O'Gilvie* action would effectively excuse [the corporate defendant] from the consequences of its reckless behavior within this state. Failure to apply Kansas law would establish an undesirable precedent for other tort and product liability action. . . . This would result in the uneven application of the public policy. Kansas tortfeasors would be required to feel the 'pecuniary punch' while out-of-state tortfeasors could require their 'guiltless' insurance companies to pay such damages. Out-of-state tortfeasors who contracted with out-of-state carriers would, therefore, not be subject to deterrence for committing reckless acts in Kansas."

The same Kansas policy also applies in the case of the driver, Printup:

> "Where exemplary damages are awarded for purposes of punishment and deterrence, as is true in this state, public policy should require

> that payment rest ultimately as well as nominally on the party who committed the wrong; otherwise they would often serve no useful purpose. The objective to be attained in imposing punitive damages is to make the culprit feel the pecuniary punch, not his guiltless guarantor." *Koch,* 211 Kan. at 405.

The awards in this case apply separately to the employer and employee. As we said in *Smith v. Printup I,* 254 Kan. 315, 356, 866 P.2d 985 (1993): "Each wrongdoer is liable to pay the punitive damages assessed against him or her. The amount of the award is to be calculated with the individual defendant's financial status and conduct in mind. . . . Joint and several liability undermines these considerations and therefore is unavailable."

Permitting insurance coverage of the punitive damages for Red Ball and Printup in this case would violate Kansas law and public policy. This is particularly true in the case of Red Ball wherein liability is based upon the complicity rule set forth in K.S.A. 60-3701(d)(1). We conclude that Hartford's insurance policy does not cover the punitive damage awards against Red Ball or Printup. Accordingly, we reverse the part of the trial court's judgment holding that Hartford is liable for punitive damages awarded against Red Ball. In all other respects, we affirm the decision of the trial court.

Affirmed in part and reversed in part.